2169.

SUPREME COURT OF THE UNITED STATES.

No. 124.

THE STEAMSHIP FALCON, HER TACKLE, APPAREL, AND FURNITURE, GEORGE LAW AND MARSHALL O. ROBERTS, CLAIMANTS AND APPELLANTS,

vs.

OWEN R. FLYNN, OWNER OF THE SCHOONER ELLEN.

APPEAL FROM THE CIRCUIT COURT OF THE U. S., FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Certificate of clerk, circuit court	1	1
" " district court	2	1
Proceedings in district court	3	1
Libel	3	1
Stipulation of parties	8	3
Consent of counsel	9	4
Orders of court	10	4
Stipulation of parties	11	5
Answer of claimants	12	6
Replication to answer	15	7
Deposition of Joseph Moss, on part of libellant	16	8
" " Wilkeson Waters	19	9
" " Charles D. Moore	24	12
" " Thomas C. R. Buckley	24	12
" " Benjamin H. Moss	24	12
Deposition of Samuel B. Robertson, on part of claimants	25	12
" " John C. Hannings	30	15
" " Henry R. Francis	36	18
Testimony for libellant from minutes	42	21
" " Edward Young	42	21
" " Benjamin H. Moss	42	21
Interlocutory decree	46	22
Commissioner's report	47	23
Testimony on reference	49	23

GIDEON, print.

	Original.	Print.
Final decree on commissioner's report	53	25
Notice of appeal to circuit court	55	26
Bond for costs	56	26
Petition to circuit court	59	28
Decree of circuit court	66	30
Notice of appeal to Supreme Court	68	31
Petition of appeal to Supreme Court	70	32
Citation and service	74	33

UNITED STATES OF AMERICA,
Southern district of New York, ss.

I, John W. Nelson, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify, that the writings annexed to this [L. S.] certificate are true copies of their respective originals, on file and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this third day of December, in the year of our Lord one thousand eight hundred and fifty-two, and of the independence of the said United States the seventy-seventh.

JOHN W. NELSON, *Clerk.*

UNITED STATES OF AMERICA,
Southern district of New York, ss.

I, J. W. Metcalf, clerk of the district court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify, that the writings annexed to this [L. S.] certificate are true copies of their respective originals, on file and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this thirtieth day of January, in the year of our Lord one thousand eight hundred and fifty, and of the independence of the said United States the seventy-fourth.

J. W. METCALF, *Clerk.*

At a stated term of the district court of the United States of America, for the southern district of New York, held at the City Hall, in the city of New York, on Tuesday, the 26th day of December, in the year of our Lord one thousand eight hundred and forty-nine; present, the honorable Samuel R. Betts, district judge.

OSCAR R. FLYNN
vs.
THE STEAMSHIP FALCON, her tackle, &c.

January 30, 1849.

The libellant files his libel in the words and figures following:

To the honorable Samuel R. Betts, judge of the district court of the United States, for the southern district of New York.

The libel and complaint of Owen R. Flynn, of Suffolk, in the State of Virginia, owner of the schooner Ellen, whereof Benjamin H. Moss

late was captain, her tackle, apparel, and furniture; against the steamship Falcon, her tackle, apparel, and furniture, whereof —— Thompson late was or is master; against all persons lawfully intervening or claiming for their interests therein in a cause of collision, civil and maritime; and thereupon the said libellant alleges and articulately propounds as follows:

First. That on the 23d day of January, in the year 1849, the said schooner Ellen being then a tight, staunch, and well built vessel, of the burden of 70 tons or thereabouts, and then completely rigged and sufficiently provided with tackle, apparel, and furniture, and being then victualled and manned for her intended voyage, left the port of New York for Suffolk, in the State of Virginia, with a lading of goods to the value of one hundred and four dollars, or thereabouts, and in ballast.

Second. That said schooner continued in the prosecution of her said voyage until, on the morning of the 24th January, when the said schooner being between Little Egg Harbor and Absecom beach, on the Atlantic ocean, within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of this honorable court, and heading on a south-southeast course, with the wind southwest by south, without the fault of the captain or crew of the said schooner Ellen, and without it being possible for the said captain or crew to avoid the said steamship, and the said captain and crew doing all they could to avoid said steamship, said steamship Falcon came into collision with the said schooner Ellen, and struck her on her starboard bow, and immediately sunk her, so that the said crew of the said schooner Ellen had barely time to seize hold of the sides of the said steamship and save their lives.

That the said collision was caused by the fault and negligence of those then in charge of the said steamship, and could have been avoided easily, or with proper care and attention, by the said steamship, or those in charge of her.

That the said schooner Ellen immediately sunk with all her tackle, apparel, and furniture, and cargo, and with all the clothing and other property of the captain and crew. That the said captain and crew, having been rescued and taken on board the said steamship, the said steamship continued on her course, and arrived at the port of New York on the afternoon of the 24th of January, 1849.

Third. That the said schooner Ellen, at the time of the collision aforesaid, was a tight, strong, staunch, and well built vessel, well manned, furnished, and equipped, and that the libellant then was the true and lawful owner of the same, and of her tackle, apparel, and furniture.

Fourth. That at the time of the collision the said schooner Ellen, her tackle, apparel, and furniture, was of the true and actual value of three thousand dollars, and that the said libellant, by the said collision, hath sustained damages to that amount and over.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court; in verification whereof, if denied, this libellant craves leave to refer to the depositions and other proofs to be by them exhibited in this cause.

Wherefore the libellant prays that process in due form of law, according to the course of courts of admiralty, and of this honorable court in causes of admiralty and maritime jurisdiction, may issue against the said steamship Falcon, her tackle, apparel, and furniture, and that all persons having, or pretending to have, any right, title, or interest therein, may be cited to appear and answer on oath all and singular the matters so articulately propounded; and that this honorable court would be pleased to pronounce for the damages aforesaid, and to decree such other relief to the libellant as shall to law and justice appertain; also to condemn the said steamship, her tackle, apparel, and furniture, and all persons intervening or claiming for their interest therein in costs.

O. R. FLINN,
GERARD & BUCKLEY, *Proctors*,
THOS. C. BUCKLEY, *Advocate*.

UNITED STATES OF AMERICA,
Southern district of New York, ss.

On this 30th day of January, 1849, before me, personally appeared Owen R. Flynn, the above named libellant, who, being by me duly sworn, did depose and say, that he had heard read the above libel by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on his information or belief, and as to those matters he believes it to be true.

GEO. W. MORTON,
U. S. com'r.

District court of the United States, for the southern district of New York.

Filed the 30th day of January, 1849.

Stipulation entered into pursuant to the rules of practice of this court.

Whereas a libel was filed in this court, on the 30th day of January, in the year of our Lord one thousand eight hundred and forty-nine, by Owen R. Flynn against the steamship Falcon, her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that the said vessel, her tackle, &c., may be condemned and sold to pay the demand of the said libellants; and the party hereto hereby consenting and agreeing, that in case of default or contumacy on the part of the libellant or his surety, execution may issue against their goods, chattels, and lands, for the sum of two hundred and fifty dollars.

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and are, bound in the sum of two hundred and fifty dollars, conditioned that the libellant above named shall appear and answer to the cause and interrogatories, abide by the final decree entered in the cause, and

shall pay all such costs as shall be awarded against him by this court, or, in case of appeal, by the appellate court.

O. R. FLYNN,
PETER S. MARCH.

Taken and acknowledged, this 30th day of Jan'y, 1849, before me.
GEO. W. MORTON,
U. S. com'r.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Owen R. Flynn and Peter S. March, parties to the above stipulation, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

O. R. FLYNN,
PETER S. MARCH.

Sworn to, this 30th day of January, 1849, before me.
GEO. W. MORTON,
U. S. com'r.

United States district court.

OSCAR R. FLYNN
vs.
THE STEAMSHIP FALCON, her tackle, &c.

I hereby consent that no process of attachment issue against the said vessel, her tackle, &c. provided the claimants execute stipulations for costs, and value the latter in the sum of three thousand dollars, the surety to justify before the commissioner, and the claimant paying into court the costs of the officers of court to the time of stipulating. The claimant also to consent to appear and answer the libel on file, on or before the 20th instant, and failing so to do, the defaults to be entered, and a reference to be had to the commissioner to compute the amount due. The stipulation for value to represent the vessel.

GERARD & BUCKLEY,
Lib'ts' proctors.

I hereby consent to appear for the claimants, and that an order be entered pursuant to the terms of the above consent.

E. H. OWEN,
Proc. for cl'ts.

Order from minutes.

On reading and filing a consent to stipulate and waive issuing process, and the terms of the consent being complied with, on motion of E. H. Owen, proctor for the claimants, it is ordered, that no process of

attachment issue, but that the stipulations for value represent the vessel, and that the appearance of the claimants be entered.

And on motion of Gerard & Buckley, proctors for the libellant, it is ordered, that unless the claimants file and perfect their answer on or before the 20th February next, then their defaults be entered, and a reference had to the commissioner.

District court of the United States, for the southern district of New York, in admiralty.

Filed the 30th day of January, 1849.

Stipulation entered into pursuant to the rules of practice of this court.

Whereas a libel was filed on the thirtieth day of January, in the year of our Lord one thousand eight hundred and forty-nine, by Owen R. Flynn against the steamship Falcon, for tackle, &c., for the reasons and causes in the said libel mentioned; and whereas the parties in interest have consented to execute stipulations for costs and value, the latter in the sum of three thousand dollars in lieu of the vessel being in the custody of the marshal, under the process to be issued in pursuance of the prayer of said libel, and further consenting to appear and answer the said libel on file, on or before the 20th day of February next, or their default to be entered, this stipulation to represent the vessel, as appears from said consent now on file in said court; and the parties hereto hereby consenting and agreeing that, in case of default or contumacy on the part of the claimants or their sureties, execution for the above amount may issue against their goods, chattels, and lands.

Now, therefore, the condition of this stipulation is such, that if the stipulator undersigned shall at any time, upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the above named suit may proceed, and upon notice of such order or decree to E. H. Owen, esq., proctor for the claimant of said vessel, abide by and pay the money awarded by the final decree rendered by the court, or the appellate court if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue.

GEORGE LAW,
M. O. ROBERTS.

Taken and acknowledged, this 30th day of January, 1849, before me.

GEO. W. MORTON,
U. S. commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

George Law and Marshall O. Roberts, parties to the above stipulation, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of six thousand dollars, over and above all his just debts and liabilities.

GEORGE LAW,
M. O. ROBERTS.

Sworn to this 30th day of January, 1849, before me.

GEO. W. MORTON,
U. S. commissioner.

March 14th, 1849.

The claimant appears in court, and files the answer, as follows:

United States district court, for the southern district of New York.

To the honorable Samuel R. Betts, judge of the district court of the United States, for the southern district of New York.

And now, George Law and Marshall O. Roberts, owners of the steamship Falcon, her tackle, apparel, and furniture, appear before this honorable court, and for claim, and answer to the libel and complaint of Owen R. Flynn, claiming to be the owner of the schooner Ellen, against the said steamship, her tackle, &c., and against all persons lawfully intervening for their interest in the said steamship, in a cause civil and maritime; and thereupon they claim and insist that they are, and were, the owners of the said steamship, her tackle, &c., at the times in the said libel stated, and have therefore a right to intervene in the cause for their interest therein; and as to the matters contained in the said libel, they allege and articulately propound, as follows:

First. That they have no knowledge of the matters contained in the first article of the said libel, and cannot otherwise answer thereto, and they therefore leave the libellant to his proofs thereof.

Second. They admit, that on the 24th day of January, 1849, last, a collision occurred at sea between the said steamship and the said schooner, and that the said schooner immediately sunk, with her tackle, apparel, and furniture, and other property on board thereof, and that the master and crew were taken and received on board of the said steamship, and brought into this port; but they deny that the said collision was caused by the fault or negligence of those then in charge of the said steamship, or that it could have been avoided easily or with proper care or attention by the said steamship or those in charge of her.

They also deny that said collision occurred without the default of the captain or crew of the said schooner, or without it being possible for the said captain or crew to avoid the said steamship, or that the said captain and crew did all they could to avoid the said collision; but on the contrary they aver, that the said collision was caused by and through the fault of the said schooner, and by and through the fault, bad management, carelessness, negligence, and inattention of the master and those having the command and management of the said schooner; and that with proper management, care, and attention, on the part of the said schooner, and those navigating and having charge and command of her, such collision might and could have been avoided; and, in support of their allegations, they refer to the proofs taken, and to be taken, in this cause.

Third. That they have no knowledge of the matters contained in the third and fourth articles of the said libel, and they leave the libellant to make such proofs thereof as he may be advised.

Fourth. That all and singular the premises are true; in verification whereof, if denied, the claimants and respondents crave leave to refer

to the depositions and other proofs to be by them exhibited in this cause.

Wherefore the respondents pray that this honorable court would be pleased to pronounce against the libel aforesaid, and to condemn the libellants in costs, and otherwise right and justice to administer in the premises.

GEORGE LAW.

Sworn before me, this 14th day of March, 1849.
CHARLES W. NEWTON,
United States' Commissioner.

UNITED STATES DISTRICT COURT,
In admiralty.

To the honorable Samuel R. Betts, judge of the district court, for the southern district of New York.

The replication of Owen R. Flynn, owner of the schooner Ellen, her tackle, &c., to the claim and answer of Marshall O. Roberts and George Law, owners of the steamship Falcon, her tackle, &c.

This replicant saving and reserving for himself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said claim and answer, for replication thereunto says, that he will aver, maintain, and prove his libel to be true, certain, and sufficient in law to be answered unto; and that the said answer and claim is uncertain, untrue, and insufficient, to be replied unto by this replicant; without that, that any other matter or thing whatsoever in the said claim and answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this replicant is and will be ready to aver, maintain, and prove as this honorable court shall direct; and humbly prays, as in and by the said libel he hath already prayed.

GERARD AND BUCKLEY,
Libellant's Proctors.
THOMAS D. BUCKLEY,
Advocate.

Monday, October 15th, 1849.

This cause being called in its order on the calendar, ordered hearing.

Evidence for the libellant.

Deposition of Joseph Moss, read.
Deposition of Winterton Waters, read.
Charles B. Moore, sworn.
Thomas C. T. Buckley, sworn.
Benjamin H. Morse, sworn.

Evidence for the claimants.

Deposition of Samuel P. Robertson, read.
Deposition of John C. Hannings, read.
Deposition of Henry R. Francis, read.
Wild T. Thompson.

UNITED STATES DISTRICT COURT.

OWEN R. FLYNN
vs.
THE STEAMSHIP FALCON, her tackle, &c.

Libellant's depositions.

Deposition of Joseph Moss, a witness produced, sworn, and examined de bene esse on [the] part of libellant, by consent of claimant's proctor, on the 1st of February, 1849, deposes and says:

I am twenty-two years of age. I hail from Suffolk, Virginia. I have been off and on following the sea about two years.

Q. Were you on board of the schooner Ellen at the time of the collision between her and the Falcon?

A. Yes, sir.

Q. At what time did it occur?

A. At about five minutes after 6, a. m., I should judge, because the watch was called at 6, and I had just been called from below.

Q. Where was the steamer when you first saw her?

A. When I came on deck I saw the steamer, I can't say exactly where I first saw her; can't say how far off she was off; as soon as I came on deck I saw her; she was steering pretty much in shore of us.

Q. How far off did she appear to be?

A. About a mile when I first saw her.

Q. Was she to the windward or leeward of the schooner?

A. To the windward.

Q. Did she keep on the same course, or did she change her course?

A. She changed her course.

Q. How near was she to the schooner when she changed her course?

A. About a quarter of a mile.

Q. If the steamer had not changed her course, how would she have passed the schooner?

A. She would have passed to the windward of us some 200 yards, I should think.

Q. Did you hear a hail from the steamer before she struck the schooner?

A. Yes, sir; they halloed to us to go about.

Q. What did the captain then do?

A. He told us to go forward after they hailed us, and light up the jib sheets.

Q. For what purpose?
A. To shake her up in the wind, calculating the steamer would pass us.
Q. Did the schooner get around before the steamer struck her?
A. No, sir.
Q. Why, not?
A. Because the steamer struck us before she could get around.
Q. How was the morning?
A. It was light.
Q. Was it day-light?
A. Yes, sir.
Q. How was the wind?
A. It was WSW. when I went below; don't know how it was then. When I came on deck she was headed off some.

Cross examined.

Don't know what time the sun rose on the 24th January, the day of the collision. When I came on deck the wind was as near as I could judge WSW. by S. I know the whole and half points, but not the quarter points of the compass. I can steer by compass; when I came on deck our vessel was close hauled; don't know how close she can lay to the wind. When I came on deck I was between mainmast and foremast, near the forward hatch, till they struck; did not notice whether the captain altered her tiller; they hailed us; don't know whether the captain had put her helm up any before the steamer hailed us. Our sails were full up to the time we were hailed. I did not look over the schooner's bow to see how the steamer bore from us; don't know how we were heading when we came on deck. I judge our schooner was heading about southeast when we came together. We had been steering south and southeast before; don't know how fast we were going; made no calculation and cannot say. I saw no lights on board of the steamer; we showed none. We showed no lights because it was day, and we calculated she could see us as well as we could see her.

JOSEPH MOSS.

Sworn to before me, this 2d day of February, 1849.

GEORGE W. MORTON,
United States Commissioner.

Consented that the above deposition, when sworn to before a commissioner, may be read on the trial of this cause with the same effect as if taken de bene esse before a United States commissioner.

February 1st, 1849. F. B. CUTTING.

Wilkesen Waters, a witness produced, and sworn, and examined de bene esse in the above cause, on the part of the libellant, by consent of claimant's proctor, on the 1st of February, 1849, deposes and says:

I am 23 years of age and upwards, reside in Sawsignant county, Vir-

ginia; have followed the sea for about four months. I was on board of the Ellen at the time of the collision with the Falcon. It took place a little after 6 o'clock in the morning. I did not take notice what day it was; at the time of the collision I was on deck of the schooner. I had been on deck two hours. Mine and the captain's watch was just out, and he had called the hands up. The captain was at the helm at the time of the collision. When I first saw the steamer she was about a mile from us. She appeared to the windward of us about 100 yards. I do not know what course the steamer pursued from the time I first saw her until the time she struck us. I could not steer by compass, and therefore could not tell.

Q. Did the steamer keep the same course from the time you first saw her till she struck the schooner, or what course did she keep?

A. I can't tell, unless I could steer by compass.

Q. After you first saw the steamer did she change her course; and if so, how far from the schooner?

A. I can't tell.

Q. Before the steamer struck the schooner did you hear any hail from the steamer?

A. Yes, sir, they sung out for us to go about.

Q. What did the captain of the schooner then do?

A. The captain said, I can't.

Q. What did the captain of the schooner direct his men to do?

A. He put his helm hard down, and told his men to run forward and shake up the jib sheets.

Q. What did he do this for?

A. In order to go about.

Q. Did the schooner go about before the steamer struck her?

A. She was in stays going around.

Q. Why did she not get about before steamer struck her?

A. Because she did not have time to catch the wind.

Q. Where did the steamer strike the schooner?

A. On starboard bow.

Q. What became of the schooner then?

A. As soon as the ship got clear of her, she went right down.

Q. How was the morning?

A. It was day-light.

Q. If the steamer had continued on sailing as when you first saw her, in what direction would she have passed the schooner?

A. To the windward.

Q. Why did she not pass her to the windward?

A. Because she must have kept hard off.

Q. How far was the steamer from the schooner when she began to keep hard off?

A. About 50 yards I think.

Q. How long after you were hailed from the steamer to go about, did the collision take place?

A. I can't tell exactly, it was not but a very few minutes.

Cross examined.

Q. How many voyages at sea had you made before the one spoken of?

A. Had been to New York from Virginia, and was on my way back; that is all I had been to sea; the schooner Ellen was about 82 tons, but I don't recollect; she hailed from Suffolk, Va.; don't know how old she was; four men including the captain on board; I was a hand on board; vessel was tiller rigged; the captain was at the helm; I was on deck abreast of the cabin door; this was during the captain's watch, before the collision; no one else on deck then; it was there I first saw the steamer; before I saw her I had been on the look-out forward; I came aft when the other watch was called; don't know how we were sailing, whether close hauled or not; the sails were hauled aft; we were not going very fast; we were going with a head wind very slow; when I saw the steamer I looked on the right hand side; I did not look over the bows of the schooner to see her direction with reference to the bows of the steamer; there was a compass in our binnacle; I did not look at it, for I could not tell the course by compass.

Q. When you saw the steamer about a mile off, what did your captain say or do?

A. He said I will steer till the steamer goes by; I did not look to see whether he moved her tiller then; I was not noticing him; the first thing I noticed was the captain telling the men to go forward and shake up the jib sheets; I was standing close to the cabin door on deck with my back to the tiller; I saw the helm afterwards hard down; don't know whether he had or had not put his helm hard up; our sails shook after the helm was hard down; the jib sheets began to shake; before that, they were full; could not tell whether the steamer did or did not change her position before our helm was put hard down; we carried no light then, and showed none; we did not hail them or make any noise until they hailed us; the steamer had no light either; I saw none; we did not make any noise; it would have been no use on account of the noise of the engine.

Q. Was it before or after the captain said, I can't, that the helm was put down?

A. It was before the steamer hailed us to go about; the captain put his helm hard down, and answered I can't; and told the men to go forward and shake out the jib sheets; it was all done together about the same time?

Q. How was the wind with you?

A. Ahead, right ahead; I don't know from what point of the compass.

his
WILKESON × WALTERS.
mark.

Sworn to before me, this 2d day of February, 1849.

GEO. W. MORTON,
U. S. Commissioner.

Consented that the above deposition when sworn to before a commissioner, may be read on the trial of this cause with the same effect as if taken de bene esse before a U. S. commissioner.

Feb'y 1st, 1849. F. B. CUTTING.

Charles B. Moore, sworn. Since May 1st last, has been connected with business of Messrs. Cutting & Owen, and was this morning requested to take charge of the cause and papers in the cause; had no other concern in the cause or its prosecution; the deposition of Charles Christian is not with the papers.

Thomas C. R. Buckley, sworn, one of proctors of libellant. Entered into consent with Mr. Cutting, that witnesses might be examined de bene esse at office of Cutting & Owen; witness attended at their office, and Christian was examined, and his examination was reduced to writing, and swore to his disposition.

A copy was served on witness.

No further proceedings on this affidavit for the present.

Benjamin H. Moss, sworn. Was master of schooner Ellen in January, 1849; she was owned by libellant; her papers were lost with the vessel; she was in the shingle trade between Suffolk, Virginia, and New York, 70 tons; four men usual crew; at time Ellen had four on board.

Defence—stipulation read.

Depositions offered—(objected to unless all are produced).

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Samuel B. Robertson, a witness produced and examined de bene esse on the part of the claimants, being duly sworn, says: I am 39 years old; I reside at Bath, in the State of Maine; I was first officer on board of the steamship Falcon on her late voyage to this port, and saw the collision that occurred between the schooner Ellen and the Falcon; the collision occurred on the 24th of January instant, at about ½ past five o'clock in the morning; it was starlight; we got an observation of the north star after the collision; it was gray in the morning to the westward; the schooner was on our larboard bow; we could not see as far in that direction as in the opposite direction, which was towards the eastward.

Q. Where were you at the time of the collision and for a short time previous thereto; previous to the collision I went on the larboard wheel house to look for a light; I saw the light a-beam, and went down from the wheel-house to the captain's office, which was on the main deck, and informed him that I had made a light; I then heard a man on the look-out on the forecastle say, "a sail on the larboard bow;" I ran forward and saw the vessel, and saw no other way to go clear of her than to put the helm a-port. I then immediately sang out to the man at the wheel "port your helm;" he answered, "port, hard to port, sir." I could not judge exactly, but I should think the schooner was at this time about a quarter of a mile off. I hailed the schooner

to go about, and received an answer of some kind, I don't know what it was. The schooner kept off free from the wind. She was on a wind when I first saw her. When I first saw the schooner the wind was southwest. She was on the wind, and was heading about S. S. east. The steamship was running N. N. east, and was, when the collision took place, heading about east by north. She was on the swing then—the helm having been put to port. The schooner, when off the wind, was making, or must have been making, some six or seven knots. The Falcon had previously been making, with steam and sails, twelve knots. When I told the schooner to go about she did not do so, but kept off four points from the wind. The steamer answered her helm immediately. It was not more than five or ten minutes to the longest, before the collision occurred after the order to port the helm. The bell was rung to stop and back the engine; this was done as soon as we found we could not clear the schooner, which was perhaps two or three minutes before the collision. I can't tell whether the engine had actually stopped before the collision or not; I was looking at the vessel. From the time I sung out hard a-port to the time of the collision, the steamer had changed her course about five points, as near as we could judge, and was still on the swing; her helm was to port.

Q. Suppose the schooner to have kept her course, would the steamer have cleared her? (Objected to.)

Yes, if the schooner had kept her course on the wind, we should have cleared her.

Q. When you hailed the schooner, or at any time, did you observe, and can you state, what movements were made on board of her as to changing her course?

All that I could see was that she was keeping off free from the wind.

Q. State how the vessels came together.

She struck us with her starboard bow upon our larboard bow.

Witness being cross examined by libellant's advocate, deposes and says:

Q. What injury did the collision cause to the steamer?

A. It started the cut-water, and carried away the head rails and bobstay and bowsprit shrouds on the larboard side; it bruised the plank some, carried away the bowsprit jib and topmast stay.

Q. How do you fix the time of the collision?

A. By the captain's watch, about the time; I did not look at the time at the instant.

Q. Where was the captain's watch kept?

A. In his pocket.

Q. When had you looked at it last?

A. After he came out on deck; he came out immediately after I told him about the light.

Q. Did you see his watch before or after the collision?

A. After.

Q. What was the time when you saw it after the collision?

A. Twenty minutes of 6 a. m.

Q. Did the captain take it out and ask you to note the time?

A. He took it out and spoke about the time; he did not ask me to note the time; he was speaking about the difference in time between that and the clock in the pilot-house; he said the clock in the pilot-house was too fast.

Q. Did you see the captain's watch at the time, or do you speak from what he told you?

A. I speak from what he told me; I did not see it myself.

Q. When are you going to sea, and where?

A. I expect to sail to-morrow for Chagres in the Falcon.

S. B. ROBERTSON.

Sworn before me, this 31st day of January, 1849.

CHAS. W. NEWTON,
U. S. Commissioner.

Being further examined on the direct:

Q. Was there any look-out kept on board of the Falcon?

A. Yes, sir, there were two men stationed on the forecastle.

Q. Who was in the wheel-house?

A. The third mate.

Q. How far from the land did the collision occur?

A. I should think about 10 or 15 miles. It was dark; I could not tell exactly.

Q. What light did the steamer carry?

A. She carried a red light on one wheel-house and a blue light on the other.

Q. How far can these lights be seen on a night such as that was at the time of the collision? (Objected to.)

A. They can be seen five or six miles off, at all events.

Q. If the schooner, instead of keeping away, had luffed, would the collision have occurred? (Objected to.)

A. No, sir.

[Q.] If she had stood close hauled upon the wind, what would have been the consequence? (Objected to.)

A. She would have gone clear.

Q. What occasioned the collision? (Objected to.)

A. It was caused by their keeping the schooner off free from the wind.

Q. Had you any conversation with any of the schooner crew after the accident?

A. I had not.

Cross examined by libellant.

Q. How high was the top of the wheel-house above the surface of the water at this time?

A. It might have been 15 feet—might have been 20 feet.

Q. Had the steamer all sail set at the time of the collision?
A. She had all sail set.

S. B. ROBERTSON.

Sworn before me, this 31st day of January, 1849.

CHAS. W. NEWTON,
U. S. commissioner.

Examination of a witness de bene esse on the part of the claimants, February 1st, 1849.

John C. Hannings, being duly sworn, says: I am 30 years old; I reside in New York; I expect to sail from this port to-day for Chagres.

Q. Were you on board of the Falcon at the time of the collision between her and the schooner Ellen; if so, in what capacity?

I was in the capacity of third mate; I have followed the sea about 12 years; I am going again in the Falcon.

Q. When did the collision before referred to occur?

On the 24th of January last, at about half past 5 o'clock, a. m.

Q. Where were you at the time?

I was at the wheel; I had been there an hour and a half from 4 o'clock.

Q. What kind of a night was it, clear or cloudy?

It was a starlight night; some clouds flying from the time I took the wheel at four o'clock, until the collision; it was starlight; shortly before the collision it was dark to the westward, so dark that you could not see a great ways; to the westward you might see a schooner half a mile to the westward; I don't think you could further than that.

Q. What sail *was* you carrying at the time of the collision?

Jib and staysail, fore and main spencer, spanker, foresail, and foretopsail; we were going about 12 knots.

When the schooner was first discovered, what course were you heading?

North-northeast.

Q. Which way was the wind?

Southwest; it was a light breeze; it was not a strong breeze; it was a good wholesail breeze; there was no other person with me at the wheel.

Had you any and what lights aboard?

We carried two signal lights, one on each wheel-house; one red and the other blue; I think it is blue; the schooner had no lights; I did not see any lights.

Q. Was there any person, and who, upon the look-out?

There was a man on the look-out; there were two forward, one on the look-out at the time.

Q. Who first discovered the schooner?

The look-out.

Q. Did he give notice, and what did he say, and what orders were given to you?

The man on the look-out sung out "sail ho;" he turned around and said a pilot was ahead; the first order that I got was to put my wheel "hard to port"; this order was given by the chief officer almost directly

after the man on the look-out had cried out "sail ho;" I replied, "hard a-port," and immediately, as soon as it could be done, I put the helm hard a-port.

Q. Did you see the schooner at the time; if so, how was she heading?

I saw her as soon as the man cried out, as I looked up then off from the compass; I should think she was heading up as high as south-southeast, which was giving her six points free, and such a vessel as that ought to run as near as four points.

Q. How far off did she appear to be when you first saw her?

It would be almost impossible for me to tell that, but I should think that she was a quarter of a mile off, at about a point and a half off our larboard bow.

Q. Did the schooner change her course between the time you first saw her and the collision?

I think she did, but my attention was taken with my own vessel so that I could not pay particular attention to her.

Q. How did she change her course?

I think she fell off.

Q. About how many points?

I cannot answer, but the way the vessels came together she must have fallen off a considerable, or they would never have come together. (Latter part of his answer objected to.)

Q. Did you observe whether she commenced going about or not?

I think she commenced going about, and had started her head sheets for that purpose, as near as I could tell from the glimpse I had of her.

Q. Did she luff?

I think she did luff a little, and then kept away.

Q. Suppose she had luffed and kept so, would the collision have occurred? (Objected to.)

No, sir.

Q. Was there any thing to prevent her luffing? (Objected to.)

Not any thing, as far as I could judge; I don't know what working condition she was in; there was nothing in her position nor in the wind to prevent her doing so.

Q. How far were you from the land?

I should think from eight to ten miles.

Q. How long after you received orders to port your helm was it before the collision occurred?

I suppose two or three minutes; I cannot tell exactly; the two vessels were going fast; I don't know how fast the schooner was going, but I should think about five knots.

Q. How many points had the Falcon changed her course after you put the helm a-port before the collison?

She is a vessel that works very quick, and it is most impossible to tell on account of the swing of the vessel being quicker than that of the compass; I should think about three points; we had the wind on the opposite tack when the vessels came together.

I cannot tell exactly how she headed at the time of the collision, but

should think it was full as far as north-northeast; she was upon the full swing at the time she struck, and her head immediately came round to the eastward.

Q. Was any and what orders given by you to the engineer?

The chief officer sung out to me to stop the engine, and I immediately rung the bell to stop the engine.

Q. How long after the order to port was it that you received orders to stop the engine?

I should think a couple of minutes or so; I did not look at the clock, although I had one at my hand; I did not have time to look at that.

Q. How long after you received orders to stop the engine before you rung the bell to stop it?

Momently.

Q. Had the engine stopped before the collision?

That I cannot say; it is impossible to feel her engines when going.

Q. How soon after the bell rung was it that the collision occurred? (Objected to.)

Directly, instantaneously.

Q. Suppose the schooner had kept her course, would the collision have occurred? (Objected to.)

I think not.

John C. Hannings, cross examined.

Q. Where is the proper station for the forward look-out when no particular direction is given?

A. Forward, and near the knight heads.

Q. Where are the knight heads?

A. The stem of the vessel; the knight heads are two pieces of wood, one on each side of the stem.

Q. Did you pull the engine bell before you put your helm hard to port.

A. No, sir.

Q. How do you judge of the time of the collision?

A. By the clock at my shoulder.

Direct resumed.

Q. Had you any conversation with the master, or any of the crew of the schooner, after they were taken on board of your vessel; and if so, state what was said in reference to such collision.

I had conversation with the captain; I asked him if he could see the steamer; he said yes, he could see our lights; I asked him then if he had not time to work his vessel to go about; he said that he had; that he had called, all hands and had them all on deck to lighten the head sheets to go about, and that then he made up his mind not to do so, but to cross our bows; I had no more conversation with him.

J. C. HANNINGS.

Sworn to before me, this 1st February, 1849.

J. W. NELSON, *U. S. C mmissioner.*

Examination of witnesses, de bene esse, on the part of the claimants, January 31st, 1849.

Henry R. Francis, sworn. I am 30 years old; I hail from New York; I was on board the steamer Falcon on her passage from New Orleans here at the time *of* the collision between her and the schooner Ellen occurred; the collision occurred on the morning of the 24th instant, at about half past 5 o'clock; I was standing forward on the larboard side, perhaps eight feet abaft the chocks forward; I was on the look-out; there was another person with me, William Bowman; the sky was clear; it was starlight, but quite dark to the westward, as it usually is about daybreak; I saw the schooner when she was a mere dark spot upon the water; I was looking at the light-house; I don't think she was over a quarter of a mile off at the extent; the wind at this time was about southwest; I could not positively say how we were heading at the time, as I had not been to the wheel-house all night, but supposed it was about N. N. east; when we approached so that I could make out that it was a schooner, she appeared to be heading for us; she appeared to be standing towards us; when I first saw her I sung out sail ahead; the mate replied where; I said, but a point and a half on our larboard bow. The mate instantly sung out, put the wheel hard a-port, and the man at the wheel answered hard a-port; the mate then sung out to the schooner to go about. I heard no reply to that; we were together almost instantaneously afterwards. After I first saw the schooner, upon the second look, which was directly afterwards, I thought she was going about; she appeared to be nearly in stays; about the next thing was we came together.

Q. Can you state whether or not the schooner changed her course after you first saw her, and before the collision?

[A.] I think she did, from her position when I first saw her; she appeared to have kept away with the intention of standing across our bows.

Q. Before the collision occurred, and after the orders to put the wheel hard a-port, had the steamer changed her course; and if so, how much?

I should think from her appearance she had run off four points; she was heading at the time of the collision east by south, as near as I could judge.

Q. How was the schooner heading at the time of the collision?

She must have been heading between two and three points across our bow to the southward of us.

Q. Suppose the schooner had kept her course as it was when you first saw her, would the steamer have cleared her?

(Objected to.)

She would, with the distance she had run off, that is, from her appearance when I first saw her.

Q. Had you any lights; what colors, and where were they placed?

We had a red light on the starboard wheel-house, and a blue light on the larboard wheel-house.

Q. Suppose, instead of keeping away, the schooner had luffed, what would have been the result then?

(Objected to.)

If she had luffed she would have come up into the wind and shook, and the collision would not have occurred.

Q. Was there anything, and if so, what, to prevent her luffing at the time?

Nothing at all.

Q. How was she standing at the time, and immediately before the collision?

Apparently, when first sighted, about a point and a half on our larboard bow.

Cross examined by libellant.

Q. Describe the position you and Boardman were standing when you first saw the schooner, in reference to the staysail and other parts of the vessel around you.

A. We were standing on the larboard side forward, engaged in conversation about the light, on the weather side of the staysail, about 5 feet from the staysail, about 10 feet from the peak from the chocks forward.

Q. How large is the staysail; how wide?

A. 12 or 14 feet across the foot, a small staysail.

Q. Was there any body else on the starboard side of the forecastle?

A. No, sir, no one else forward but us two.

Q. What was your office?

A. Seaman.

Q. How long have you followed the sea?

A. 3 years or thereabouts, not quite three years since I first sailed from New Bedford.

Q. How many voyages had you made previous to this?

A. I mean to say I had made but one voyage from New Bedford previous to this, but that was a long voyage, and I was in several ships in the course of it.

Q. How do you judge of the time of the collision?

A. By the ship's time it was 10 minutes past four bells, but by an observation taken by the captain by the north star, a few minutes after the collision, the correct time was ascertained to be 5½ a. m.

Q. When you speak of the time by observation, you say what the captain told you, don't you.

A. Yes, sir, that is what I understood.

Being further examined:

Q. In what capacity were you serving on board of the Falcon?

A. As seaman.

Q. What kind of night was it, light or otherwise?

(Objected to.)

A. It was a starlight night, but not so clear a night as I have seen.

Q. How was it towards the westward?

(Objected to.)

A. It was dark to the westward.

Q. Did the schooner carry any light?

A. She did not, at least none was visible.

Q. At what time did you take your station as look-out?

A. About half an hour before the collision.

Q. What was your duty at the time and just before you saw the schooner?

A. I was talking to the other young man about the light-house; I said it was a light, and he said it was not; you could not see the light, but there was a light spot looming up in the horizon.

Q. How was the schooner standing when you first made her out?

A. When I first could discern what the schooner was at, she appeared to be going in stays, her head sails apparently were about shaking, then they instantly kept away as with the intention of standing across our bows.

Q. How did the light you speak of bear from you?

A. It bore a-beam about two feet abaft the cathead.

Q. Had you any conversation with any of the crew of the schooner after the collision; if so, with which of them?

A. I had, sir. I was asking the colored man (objected to by libellant) what they were about on board that they did not see our lights, and he remarked that we did see you long time ago, time enough to have kept out of your way. He said the captain had called all hands to go about; that he had gone forward and had got his hands on the jib sheets, and that the captain sung out, never mind, we will stand across the bows; he remarked that he then said it is two hot for me to remain here, and started aft and began to climb the main rigging. This conversation was aboard of the Falcon just after we had come up from breakfast.

Q. How fast was the steamer running?

A. Twelve knots. So the log told us.

Q. About how far from the beach or shore did the collision happen?

A. I should judge from the light that we made distinctly after daylight, that it was some 12 or 18 miles.

Q. Was there not plenty of room for the schooner to have luffed? (Objected to.)

[A.] If she had stood her course as she appeared when first seen, she would have gone clear to the windward of us, if both vessels had kept their course.

Q. How was she standing?

A. She appeared to be close hauled, full and by.

Q. If the schooner had wished to luff, was there anything to prevent it?

A. Nothing but the wind; she was far enough from the shore.

HENRY R. FRANCIS.

Sworn to before me, this 31st day of February, 1849.

CHAS. W. NEWTON,
U. S. commissioner.

For libellant—testimony from minutes.

Edward Young, (sworn,) boy. Served paper on Mr. Owen to-day, personally; paper held by Mr. Platt.

Notice read to produce deposition of Charles Christian. Court declined ordering deposition produced, or to allow secondary evidence of its contents; it not being taken under the act of Congress, nor on the files of the court.

Benjamin H. Moss, (again.) Left New York 23d January [at] 10 a. m., bound to Virginia, in ballast, and with some iron and cheese on board. About six miles south of Little Egg harbor at time of collision; wind S. W. or S. W. by S. in a stiff breeze; schooner would lie within six points of wind, and on that wind she lay at about five or five and a half points. His crew were Joseph Moss, David Albert, Wilkinson Waters, and self.

Saw smoke of steamer before six a. m.; she was to windward of schooner; schooner was then close hauled, heading S. S. E., steamer steering about N. N. E.; Wilkinson and Waters were on deck when steamer [was] first seen.

Thinks saw her fifteen minutes before the collision, and probably 2½ miles off. The other two men were called at six o'clock by his watch; it was then getting light. Witness was at helm steering schooner.

[Claimants object to his evidence, unless he is released; evidence taken subject to objection.]

Steamer changed her course before collision; not long. She was 150 yards to windward of schooner, as near as he could compute the distance. She changed her course to about east, and struck within two or three minutes after so changing her course. She struck schooner on starboard bow, forward of fore rigging, and schooner sank almost immediately. Witness was knocked down and injured. Witness did not alter course of schooner after saw steamer. Mate of steamer hailed schooner to go about. Witness put his helm down, and ordered men to lighten jib sheets; whilst men were at sheets steamer struck her. Thought if [we] could get schooner into wind might pass with slight injury, by taking off her jib-boom. Engine of steamer was going when she struck. Did not see any light on steamer from time he first observed her. Did not let schooner fall off upon the wind at all. There was about a four knot breeze. Collision was occasioned by steamer's altering her course; if she had kept her original course, she would have passed under stern of schooner at starboard.

Cross examined.

His watch began at 4 a. m.; weather being cold stood watch every two hours. Did not hear steamer before he saw her; thinks might hear her half mile off as wind was.

When first saw Falcon 2½ miles off; supposes she was bearing S. W. by W. from him, but did not look at his compass to observe her bearings. Looks at compass every minute almost; looked at it several times after seeing her before striking. Called the men up from below after

first saw steamer; called them to come on their watch, but with no reference to steamer. Was heading S. S. E. first time he looked at compass after seeing the steamer, and when she struck was heading about south, the schooner being then swinging. No recollection of having any conversation with captain or third mate after collision; had with chief mate.

Was picked up on the water; was badly hurt over one of his eyes. David Albert was a black man; witness tried to find him, and have him examined as witness, but could not find him.

Cross examined.

Heard hail of mate from steamer; don't recollect making any reply, but immediately put his helm down.

For claimants.

Wildo D. Thompson, sworn. Was captain of Falcon in January last at time of collision; left the ship in May last. When witness first saw schooner the two vessels were in the act of coming together. His room was in house on deck. Steamer had lights, and they were burning at time. The engine was stopped as he came on deck, and his first order was to back the engine; and thinks no reverse movement was made, but is unable to say. Did not observe compass, to see how Falcon was heading at collision, but wind was on starboard quarter, and sails had jibed over. Wind was on larboard on true course of Falcon, and thinks Falcon was as far over as east-northeast. Thinks schooner was heading southeast or southeast to east, by course. I [am] confidant the schooner was southeast easterly, when he came on deck. Schooner was about size of a pilot boat on the water; was announced to witness as pilot boat. Such objects cannot be seen far on the water at such time. Held conversation with captain of schooner on steamer after his wound was dressed. Witness asked him why he attempted to cross ship's bows? He said he thought him[self] a greater distance off, and thought he could get across before meeting. It was before six o'clock, a. m. After getting clear of the wreck took observation by north star, and it was after six; were some time clearing the wreck, and, from the time passed, knows collision was previous to six.

Cross examined.

First order he gave was to back the engine, to clear the wreck.

At a stated term of the district court of the United States of America, for the southern district of New York, held at the City Hall in the city of New York, on Monday, the fifth day of November, in the year of our Lord one thousand eight hundred and forty-nine—

Present, the honorable Samuel R. Betts, district judge.

OWEN R. FLYNN
vs.
The Steamship FALCON, her tackle, &c.

This case having been heard on the pleadings and proofs, and argued

by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed, by the court, that libellant recover in this action against the steamship Falcon, her tackle, &c., the damages sustained by the collision in the pleadings mentioned, and that it be referred to a commissioner to ascertain and compute the amount of such damage, and to report thereon to this court with all convenient speed.

Commissioner's report.

DISTRICT COURT OF THE UNITED STATES,
For the southern district of New York.

OWEN R. FLYNN
vs.
The Steamship FALCON, her tackle, &c.

In pursuance of a decretal order, made in the above entitled cause on the fifth day of November, in the year of our Lord one thousand eight hundred and forty-nine, by which, among other things, it was referred to the undersigned, one of the commissioners of this court, to ascertain and compute the amount due the libellant for damages, and to report thereon to this court with all convenient speed, I, George W. Morton, the commissioner to whom the matter was referred, do report, that I have been attended by the proctor for the libellant and claimant, and by the witnesses, and have taken and examined the testimony offered in support of the libellant's claim for damages sustained by the collision, and do find that there is due to the libellant, for the damages sustained by the loss of the vessel the sum of three thousand dollars, and for the loss of the cargo laden on board the [sum] of one hundred and four dollars, amount[ing], in the whole, to the sum of thirty-one hundred and four dollars.

Dated the twenty-seventh day of December, A. D. 1849.

All which is respectfully submitted,

GEO. W. MORTON, *U. S. com'r.*

GERARD & BUCKLEY,
Proctors for libellant.

UNITED STATES DISTRICT COURT.

OWEN R. FLYNN
vs.
THE STEAMSHIP FALCON, her tackle, &c.

Testimony on reference. 1849, December 20th.

Benjamin H. Moss, (being sworn,) says that he was master of the schooner Ellen, and commanded her for eighteen months, from August, 1846, to January, 1849. I was in command of her when she was lost by being run into by the Falcon; she was 76$\frac{6}{95}$ tons measurement; she was twelve years old; she was refitted and repaired in June, 1848.

She had put upon her new bends, transom, new top timbers, new rail, and new ceiling. The carpenter's bill was $1,214, and the new rope, cordage, paint, and other things, $200; her sails were about two years old; they were repaired last fall, in October. She had a good supply of anchors, chains, boats, compass, water cask, and was fully fitted out. She was in the shingle trade between Suffolk, Virginia and New York, at and previous to the collision; she made about ten trips a year, and generally laid up in the winter, commencing about Christmas; I was on my way home to lay up when the vessel was lost, and should have commenced my usual trips again the first of March following. I owned no part of the vessel, and am not in the employ of Mr. Flynn; I have been in the coasting [trade] 15 years; I am acquainted with vessels engaged in this trade, and with vessels of the class of the Ellen.

The Ellen had cargo on board to the value of $200; I consider the schooner well worth the sum of $3,000 at the time of the collision.

On his cross examination he says, the vessel was built at Newcastle, Delaware. She has been in the lumber trade since I have known her, that is for about five years. The lumber trade is a tolerably hard trade; I do not know what she cost when new, but vessels of that class cost when new about $6,000; Messrs. Graves & Furby, of Portsmouth, Virginia, repaired her; I was master of her at the time, and superintended the repairs; she was put in good order and completely refitted; from that time to the time of the collision she had experienced several heavy gales of wind; during those gales or subsequent, she had sustained no damage; she did not leak any. The estimate I have put upon her includes every thing appertaining to the vessel at the time of the collision; that is, the vessel, her tackle, apparel, and furniture, and everything belonging to the vessel; she was consigned to John B. Benton, No. 89, West street. BENJAMIN H. MOSS.

Adjourned until 10 a. m., to-morrow.

Saturday, December 22d, 1849.

The proctors for the respective parties being present, the reference is proceeded with on the part of the libellants.

John B. Benton being sworn says, that he is a commission merchant, doing business in the city of New York, receiving consignments principally from Virginia and North Carolina; I am well acquainted with Owen R. Flynn, the libellant, and am his agent here, and have been so for five or six years. The schooner Ellen has been regularly consigned to me for the last three years; she has been consigned to me ever since she has been owned by the libellant. She has during that time been employed in carrying shingles, and occasionally naval stores and corn; I think it was in the fall of 1848 when I last saw her; she had just come from Norfolk, where she had been repaired; I did not make a thorough examination of her, but as far as I examined her I ascertained that her upper works were in a better condition then than they had been since Flynn owned her; she was in good substantial

condition and well adapted to the coasting trade, and from her light draught of water, a very valuable vessel for the business she was engaged in, being able to go across the smaller rivers. I have had a great many vessels consigned to me, and know their general value; I have no doubt that she was fully worth the sum of three thousand dollars to Mr. Flynn, but whether she would have brought that sum at public sale, I am unable to say; I do not believe that Mr. Flynn could have replaced her for $3,000.

On his cross examination he says, he does not know the age of the Ellen; I should judge that she would have sold at public sale at the time she left this port for from 2,500 to $3,000. If you had wanted to have purchased that vessel, what would you have given for her? (ob. to.) If I had wanted to have purchase her, I would have made a more thorough examination than I did, and not having made the examination, I cannot state what I would have given for her. I do not know of any person in New York to whom I could refer, to give a more decided opinion of her value.

JOHN B. BENTON.

On further direct he says, that the Ellen had a cargo on board to the value of $104; this was owned about one-half to James B. Northfleet, Suffolk, Virginia, and the other half belonged to James E. Smith, of Suffolk, North Carolina. In my estimate of the value of the vessel I have included her sails, rigging, and every thing belonging to the vessel.

UNITED STATES DISTRICT COURT.

OWEN R. FLYNN
vs.
THE STEAMSHIP FALCON.

The value of the cargo on board of the schooner Ellen in the pleadings mentioned, being reported due the libellants, it is hereby stipulated that the persons entitled to the same are to be bound thereby.

GERARD & BUCKLEY,
Lib'ts' Proctors.

NEW YORK, *December 22d*, 1849.

At a stated term of the district court of the United States of America, for the southern district of New York, held at the City Hall, in the city of New York, on Monday, the twenty-eighth day of December, in the year of our Lord one thousand eight hundred and forty-nine.

Present, the honorable Samuel R. Betts, district judge.

OWEN R. FLYNN
vs.
THE STEAMSHIP FALCON, her tackle, &c.

On reading and filing the report of George W. Morton, United States commissioner, to whom the above matter was referred, by

which there is reported due the libellant, for the damages sustained by the collision, the sum of three thousand one hundred and four dollars. On motion of Messrs. Gerard & Buckley, proctors for the libellant, it is ordered, that the report be in all things confirmed, and that the libellant recover in this action against the steamship Falcon the amount reported due, together with his costs to be taxed.

And on motion of Messrs. Gerard & Buckley, it is further ordered, that unless an appeal be taken to this decree within the time limited and prescribed by the rules of this court, that the stipulators for costs and value pay the amount of their stipulations into court, and that the clerk of this court distribute the proceeds in satisfaction of this decree.

United States district court.

Notice of appeal.

THE STEAMSHIP FALCON, her tackle, &c., George Law and Marshall O. Roberts, claimants and appellants,
vs.
OWEN R. FLYNN, libellants and respondents.

GENTLEMEN: You will please take notice that the claimants appeal from the decree of his honor, Judge Betts, rendered in this cause on the 26th day of December, 1849, and from every part thereof, to the next circuit court of the United States, to be held in the southern district of New York.

January 5th, 1850.

Yours, &c.,

E. H. OWEN,
Appellants' proctor.

To Messrs. GERARD & BUCKLEY,
Respd'ts' proctors.

JAMES W. METCALF, *Esq.*,
Clerk of the U. S. district court.

Bond for costs.

Circuit court of the United States of America, for the southern district of New York, in the second circuit.

THE STEAMSHIP FALCON, her tackle, &c., George Law et al., cl'ts and appellants,
vs.
OWEN R. FLYNN, libellant and appellee.

Know all men by these presents, that we, James Van Nostrand and Henry Suydam, jun'r, are held and firmly bound unto the above named Owen R. Flynn in the sum of four thousand dollars, to be paid to the said Owen R. Flynn; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of

our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the — day of January, in the year of our Lord one thousand eight hundred and fifty.

Whereas the above named claimants have prosecuted an appeal to the circuit court of the United States, for the southern district of New York, in the second circuit, to reverse the decree rendered in the above entitled suit, by the judge of the district court of the United States, for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue. JAS. VAN NOSTRAND, [L. S.]
HENRY SUYDAM. [L. S.]

Sealed and delivered, and taken and acknowledged, this 22d day of January, 1850, before me. GEO. W. MORTON,
U. S. com'r.

UNITED STATES OF AMERICA,
Southern district of New York, ss.

James Van Nostrand and Henry Suydam, jr., being duly sworn, depose and say, and each for himself saith, that he is worth the sum of eight thousand dollars, over and above all his just debts and liabilities.
JAS. VAN NOSTRAND,
HENRY SUYDAM, Jr.

Sworn to, this twenty-second day of January, A. D. 1850, before me. GEO. W. MORTON,
U. S. com'r.

U. S. DISTRICT COURT.

THE STEAMSHIP FALCON, &c., ads. OWEN R. FLYNN.

GENTS: You will please take notice, that James Van Nostrand, president of the Merchants' Exchange Bank, residing number 293 Henry street, South Brooklyn, and Henry Suydam, jr., grocer, doing business in the city of New York, 107 West street, and residing 17 Strong place, Brooklyn, will execute the necessary stipulations upon the appeal in this cause, according to the rules and practice of this court, at the office of the clerk of this court at the City Hall, in the city of New York, on the 22d day of January instant, at 10 o'clock a. m. of that day.

February 18, 1850.

Yours, &c.
E. H. OWEN,
Claimants' proctor.

To Messrs. GERARD & BUCKLEY,
Libellants' proctors.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Alfred Sears of said district, being duly sworn, says, that on the 18th day of January instant, he served a copy of the above notice on Mr. Buckley, one of the proctors for the libellant in the above entitled cause personally. A. SEARS.

Sworn to before me, this 22d day of January, 1850.

CHAS. W. NEWTON,
U. S. Commissioner.

In the circuit court of the United States, for the southern district of New York, in the second circuit.

THE STEAMSHIP FALCON, her tackle, apparel, and furniture, GEORGE LAW & MARSHALL O. ROBERTS, claimants and appellants,
vs.
OWEN R. FLYNN, owner of the schooner Ellen, libellant and respondent.

To the honorable the circuit court of the United States, for the southern district of New York, in the second circuit.

The petition and appeal of the above named claimants humbly shows, that on or about the 30th day of January, 1849, the libellant, Owen R. Flynn, exhibited his libel in the district court of the United States, for the southern district of New York, against your petitioners, setting forth therein, among other things, that on the 23d day of January, 1849, the schooner Ellen, of the burthen of 70 tons or thereabouts, left the port of New York for Suffolk, Virginia, with a lading of goods of the value of one hundred and four dollars or thereabouts, and in ballast; that the said schooner continued in the prosecution of her said voyage until the morning of the 24th of January, when the said schooner being on the Atlantic ocean, between Little Egg Harbor and Absecom beach, heading on a south-southeast course, with the wind southwest by south, without the fault of the captain or crew of the Ellen, the steamship Falcon came into collision with the said schooner Ellen, and struck her on her starboard bow, and immediately sunk her; that the said collision was caused by the fault and negligence of those having charge of the steamship Falcon.

That the said libel prayed, among other things, that process in due form of law might issue against the said steamship Falcon, her tackle, &c., as is usual in like cases, and that the said steamship might be condemned and sold, &c., as by the libel on file in the office of the clerk of the district court will on reference more fully appear.

And your petitioners further show, that on or about the 14th day of March, 1849, they filed their claim and answer in the said district court, setting up amongst other things that they were the owners of the steamship Falcon; that on the 24th day of January, 1849, a collision occurred at sea, between the said steamship and the said schooner, and that the said schooner immediately sunk, but denying that the said

collision was caused by the fault or negligence of those then in charge of the Falcon, or that it could have been avoided easily, or with proper care or attention by the said steamship or those in charge of her; and insisting, on the contrary, that the said collision was caused by and through the fault of the said schooner, and by and through the fault, bad management, carelessness, negligence, and inattention of the master, and those having the command and management of the said schooner; and that with proper management, care, and attention on the part of the said schooner, and those navigating and having charge and command of her, such collision might and could have been avoided; and praying that the said district court would be pleased to pronounce against the libel, and to condemn the libellant in costs, as by the said answer on reference thereto will more fully and at large appear.

And your petitioners further show, that the said cause afterwards came on to be tried before the honorable Samuel R. Betts, judge of the said district court, on the 15th day of October, 1849, upon the pleadings and proofs in the said cause, and the said judge having heard the proofs and allegations of the respective parties, and the arguments of their respective counsel, did, on the 5th day of November, 1849, decide and make an order in the said cause "that the libellant recover in this action against the steamship Falcon, her tackle, &c., the damages sustained by the collision in the pleadings mentioned, together with his costs to be taxed, and that the said steamship, her tackle, &c., be condemned therefor."

"And it was further ordered, that it be referred to a commissioner to ascertain and compute the amount of said damages, and to report thereon to the said court with all convenient speed."

Your petitioners further show, that in pursuance of the said decree the parties appeared before George W. Morton, esq., the commissioner, and the said libellant then and there produced, and made proof before the said commissioner of the loss and damage sustained by the said collision; and after hearing the proofs and allegations of the parties upon the matters referred to him by the said decree, the said commissioner did make his report thereon, dated the 22d day of December, 1849, whereby, amongst other things, the said commissioner reported that there was due the libellant, for the damages sustained by the loss of the vessel, the sum of three thousand dollars, and for the loss of the cargo laden on board the sum of one hundred and four dollars, amounting in the whole to the sum of thirty-one hundred and four dollars.

And your petitioners further show, that afterwards, and on the 26th day of December, 1849, the said district judge did order, adjudge, and decree, "that the report be in all things confirmed, and that the libellant recover in this action against the steamship Falcon the amount reported due, together with his costs to be taxed."

And your petitioners are advised, and insist, that the decrees of the district judge, made on the fifth day of November, 1849, and the decree of the 26th day of December, 1849, were and are erroneous, and your

petitioners appeal from the whole of the said decrees to this honorable court.

And your petitioners further state, that they do not intend on this appeal to make new allegations or to pray different relief, but to seek a new decision upon the proofs and allegations which came before the said district judge, and upon such further proof as your petitioners may produce. That your petitioners intend upon such appeal to produce and take further testimony.

And your petitioners pray that the decrees hereby appealed from may be annulled, reversed, and held for naught, and that such other decree may be made thereupon as to the said circuit court shall seem just, and that this honorable court may be pleased to pronounce against the libel aforesaid, and condemn the libellant in costs, and otherwise right and justice to administer in the premises.

And your petitioners will ever pray.

E. H. OWEN, *Proctor*,
F. B. CUTTING, *Advocate*.

UNITED STATES DISTRICT COURT.

THE STEAMSHIP FALCON, &c., }
ads. }
OWEN R. FLYNN. }

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Alfred Sears, of said district, clerk in the office of E. H. Owen, proctor for the claimants in the above entitled suit, being duly sworn, says, that on the 22d day of January instant, he served a copy of the petition of appeal in this cause on Mr. Buckley, one of the libellant's proctors, personally.

A. SEARS.

Sworn to before me, this 22d day of January, 1850.

CHARLES W. NEWTON,
United States Commissioner.

(Endorsed:)

Vol. 6, 252. Oscar R. Flynn vs. The Steamship Falcon, her tackle, &c.

GERARD AND BUCKLEY,
For Libellant, Apostles.

Filed February 2d, 1850.

At a special term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the City Hall, in the city of New York, on Tuesday, the 23d day of September, in the year of our Lord one thousand eight hundred and fifty-one.

Present, the honorable Samuel Nelson, an associate justice of the Supreme Court of the United States.

THE STEAMSHIP FALCON, respondent and appellant,
ads.
OWEN R. FLYNN, libellant and appellee.

The appeal from the district court in this case coming on to be heard, Mr. Platt reads the evidence below on the part of the appellee, and is heard on the part of the appellee.

Mr. Cutting reads the evidence below on the part of the appellant, and is heard on same side.

Mr. Platt is heard in reply on part of appellee.

Curia advisari vult.

At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the City Hall in the city of New York, on Saturday, the thirtieth day of October, in the year of our Lord one thousand eight hundred and fifty-two.

Present, the honorable Samuel Nelson, an associate justice of the Supreme Court of the United States.

OWEN R. FLYNN, repondent and appellee,
vs.
THE STEAMSHIP FALCON, &c., respondent and appellant.

This cause having been brought up for hearing and trial on the twenty-third day of September, 1851, on the appeal taken by the claimants from the decree heretofore made by the district court therein, and Mr. Cutting having been heard on the part of the appellants, and Mr. J. N. Platt on the part of the respondents, and due deliberation being *being* thereupon had, it is ordered, adjudged, and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge, and decree, that the said Owen R. Flynn do recover against the said Steamship, and the said stipulators herein, the sum of three thousand four hundred and twenty dollars and nine cents, being the amount decreed to be due to the respondents by the said district court for their damages and costs, with interest thereon, from the twenty-sixth day of December, 1848, and also his costs on the said appeal, taxed at one hundred and eight dollars and sixty-four cents; and that unless the same be paid into court within ten days, process to enforce payment of the same do issue against the stipulators on said appeal, James Van Nostrand and Henry Suydam, jr., according to the course and practice of this court.

UNITED STATES CIRCUIT COURT.

THE STEAMSHIP FALCON, her tackle, &c.,
George Law and Marshall O. Roberts,
claimants and appellants,
ads.
OWEN R. FLYNN, libellant and respondent.

GENTLEMEN: You will hereby take notice, that the claimants appeal

from the decree of his honor, Judge Nelson, rendered in this cause on the day of September last, and from every part thereof, to the Supreme Court of the United States.

November 6th, 1852.

Yours, &c., E. H. OWEN,
For Appellants.

To Messrs. PLATT, GERARD, and BUCKLEY,
Respondents' Proctors.

J. W. NELSON, esq.,
Clerk of the circuit court.

U. S. Supreme Court.

THE STEAMSHIP FALCON, her tackle, &c., George Law and Marshall O. Roberts, claimants and appellants,
ads.
OWEN R. FLYNN, respondent.

To the honorable the Supreme Court of the United States:

The appeal of George Law and Marshall O. Roberts, the above named claimants and appellants, respectfully showeth: That on the thirtieth day of January, 1849, the above named Owen R. Flynn filed his libel in the district court of the United States, for the southern district of New York, against the steamship Falcon, her tackle, apparel, &c., in a cause civil and maritime, for the recovery of damages alleged to have been sustained by him to the schooner Ellen and her cargo, by collision with the said steamship Falcon, on the high seas, to wit, the Atlantic ocean; and that the said steamship Falcon was arrested upon process issued upon said libel, and was discharged upon your petitioners filing their claim and answer and entering into stipulations, and your petitioners thereupon filed their answer to said libel, and the said libellants replied thereto; and such proceedings were had in the said cause, that on the fifth day of Nov'r, 1849, a final decree was made and pronounced therein by the said district court; wherein it was in substance adjudged, that the said libellant recover against the steamship Falcon, her tackle, &c., the damages sustained by the collision in the said libel mentioned, and that it be referred to a commissioner to ascertain and compute the amount of said damages. That in pursuance of the said decree, George W. Morton, esquire, the commissioner, did, on the twenty-second day of December, 1849, make his report, whereby he reported that there was due the said libellant, for the said damages, the sum of three thousand one hundred and four dollars. That afterwards, and on the twenty-sixth day of December, 1849, ma:e his report, whereby he reported that there was due the said libellant, for the said damages, the sum of three thousand one hundred and four dollars. That afterwards, and on the 26th day of December, 1849, the said district court did order, adjudge, and decree, that the said report be confirmed, and

that the said libellant recover against the steamship Falcon the damages aforesaid.

And that after such final decree your petitioners duly appealed therefrom to the circuit court of the United States, for the southern district of New York, and the said cause was removed thereby into the said circuit court and there tried anew; and such proceedings were had in the said circuit court, that afterwards, on the day of September, 1852, the said circuit court made a final decree in the said cause, whereby it was decreed that the said decree of the district court be in all things affirmed with costs, and that the said appellee have execution, and that the stipulators cause their stipulations to be fulfilled; which said decree of the said circuit court is, as these appellants are advised, erroneous, and ought to be reversed.

Wherefore these appellants appeal, from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully pray that the said decree of the said circuit court, and the libel, answer, pleadings, depositions, evidence, and proceedings in the said cause, may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree dismissing said libel with costs, or such other decree as to the said Supreme Court shall seem just.

E. H. OWEN,
Att'y for appellants.

New York, Nov. 6th, 1852.

Citation.

By the honorable Samuel Nelson, one of the judges of the circuit court of the United States, for the southern district of New York, in the second circuit, to Owen R. Flynn.

Whereas the steamship Falcon, her tackle, &c., George Law and Marshall O. Roberts, claimants, lately issued out of the Supreme Court of the United States a writ of error, directed to the judge of the circuit court of the United States, for the southern district of New York, in the second circuit, stating that, in the record and proceedings, as also in the rendition of the judgment of a plea in the said court, before the judge thereof, the steamship Falcon, George Law and Marshall O. Roberts, claimants, and Owen R. Flynn libellant, a manifest error hath happened, to the great damage of the said steamship Falcon, George Law and Marshall O. Roberts, claimants.

And whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated Supreme Court of the United States, held at the Capitol, at the city of Washington, on the sixth day of December next, you are therefore hereby cited to appear before the said Supreme court, at the city of Washington, on the said sixth day of December next, to do and receive what may appertain to justice to be done in the premises.